IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 18, 2006 Session

# GIL CARTWRIGHT, ET AL. v. HARRY A. PRESLEY dba PRESLEY RESTAURANT EQUIPMENT

**Appeal from the Chancery Court for Hamilton County**
**No. 05-0351 W. Frank Brown, III, Chancellor**

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**No. E2005-02418-COA-R3-CV - FILED JANUARY 23, 2007**

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In their complaint, the plaintiffs, Gil Cartwright and G & C Flowers, Inc., alleged that the defendant's negligent assembly and installation of a walk-in cooler damaged their property, including damage to a retail business. The defendant filed a motion for summary judgment, asserting that the suit is barred by T.C.A. § 28-3-202 (2000), which prescribes a four-year statute of repose on "[a]ll actions to recover damages for any deficiency in the . . . construction of an *improvement to real property*." (Emphasis added). The trial court granted the defendant's motion. The plaintiffs appeal, primarily arguing that the trial court erred in finding that the walk-in cooler constitutes an "improvement to real property," thereby subjecting the plaintiffs' cause of action to the subject period of repose. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

John R. Morgan, Chattanooga, Tennessee, for the appellants, Gil Cartwright and G & C Flowers, Inc.

Joseph R. White, Chattanooga, Tennessee, for the appellee, Harry A. Presley dba Presley Restaurant Equipment.

## OPINION

### I.

Plaintiff Gil Cartwright is the principal in the plaintiff G & C Flowers, Inc., a retail floral and design business with its principal place of business in Chattanooga. The defendant Harry A. Presley is the sole proprietor of Presley Restaurant Equipment, a seller and installer of, among other things, restaurant equipment.

In September, 2004, Cartwright purchased the subject real property from Paul Mallchok. Approximately 10 years earlier, in August, 1994, Mallchok had contracted with the defendant for the sale, assembly, and installation of a frost-free, walk-in cooler specifically designed as a cooling unit for flowers. The record reflects that, in September, 1994, the defendant received the parts of the unassembled cooler from the manufacturer. The parts weighed some 2,960 pounds. On September 25, 1994, the defendant began to assemble and install the cooler on the site of the retail floral and design business. The defendant completed the assembly and installation around October 1, 1994. The defendant then hired AGS Refrigeration to install a refrigeration unit in the assembled cooler. AGS Refrigeration completed its work by October 31, 1994. The walk-in cooler was first put into service on or about November 1, 1994.

On March 29, 2005, Cartwright and G & C Flowers, Inc. filed this action, alleging that the defendant negligently constructed and installed the walk-in cooler in that he (1) failed to use proper materials, (2) failed to install an insulated floor, and (3) failed to plumb for moisture drainage. The plaintiffs' complaint states that "the negligent installation and defective assembly of the walk-in cooler by the defendant [] was hidden and not discoverable by the plaintiff[s], or [Mallchok], until the last two (2) years, when water damage became so apparent such as to require floor removal and crawl space inspection." The complaint further claims that, as a result of the defendant's negligent construction and installation of the cooler, the plaintiffs were forced to spend in excess of $56,000 to repair the building's floor, sub-floor, and joints.

The defendant filed a motion for summary judgment on the ground that the four-year statute of repose found at T.C.A. § 28-3-202 bars the plaintiffs' cause of action. The trial court granted the motion and dismissed the plaintiffs' suit. Specifically, the court found that the walk-in cooler is an "improvement to real property, and thus, the application of T.C.A. § 28-3-202, bar[s] the plaintiff[s'] cause of action." As a further ground for granting the defendant's motion, the court, acting *sua sponte*, held that the four-year statute of limitations for contracts of sale found at T.C.A. § 47-2-725 (2001) also bars the plaintiffs' suit. This appeal followed.

II.

The plaintiffs raise the following issues for our consideration:

> 1. Whether the trial court erred in finding that the statute of repose found at T.C.A. § 28-3-202 bars the plaintiffs' cause of action where there is a genuine issue of material fact as to whether the walk-in cooler at issue is an "improvement to real property" within the meaning of that statute.
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> 2. Whether the trial court erred in holding, *sua sponte*, that the statute of limitations found at T.C.A. § 47-2-725 bars the plaintiffs' cause of action in view of the fact that the plaintiffs' allegations against the

> defendant are based on a negligence theory of recovery, rather than a contractual theory of liability.

III.

Our standard of review of a grant of summary judgment is set forth in Tenn. R. Civ. P. 56.04 and addressed in many appellate court decisions. In determining whether summary judgment is appropriate, a court must determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. When determining whether there is a genuine issue of material fact, the trial court "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993). A disputed fact is "material" if it must be decided to resolve the claim or defense at which the motion is directed. ***Id.*** at 215. Because a motion for summary judgment presents a pure question of law, our review is *de novo* on the record below with no presumption of correctness as to the trial court's judgment. ***Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993).

IV.

The plaintiffs first contend that the trial court erred in ruling, as a matter of law, that T.C.A. § 28-3-202 bars their cause of action. Specifically, they argue that the trial court erred in holding that the defendant's assembly and installation of the walk-in cooler at issue constitutes the construction of an "improvement to real property" under the statute.

T.C.A. § 28-3-202 provides as follows:

> All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or *construction of an improvement to real property*, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within four (4) years after substantial completion of such an improvement.

(Emphasis added). The legislative purpose behind the statute is to "insulate contractors, architects, engineers and the like from liability for their defective construction or design of improvements to

realty where either the occurrence giving rise to the cause of action or the injury happens more than four years after the substantial completion of the improvement." ***Agus v. Future Chattanooga Dev. Corp.***, 358 F. Supp. 246, 251 (E.D. Tenn. 1973); *see also* ***Chrisman v. Hill Home Dev., Inc.***, 978 S.W.2d 535, 540 (Tenn. 1998); ***Watts v. Putnam County***, 525 S.W.2d 488, 492 (Tenn. 1975).

It is undisputed that the defendant's assembly and installation of the walk-in cooler was substantially completed, at the very latest, by October 31, 1994. The plaintiffs' suit was not filed until March, 2005, *i.e.*, more than 10 years later. The discovery rule, which, in general terms, is utilized to determine when a cause of action accrues under a statute of *limitations*, does not toll the statute of repose found at T.C.A. § 28-3-202. *See* ***Watts***, 525 S.W.2d at 491. Therefore, the only question that we must answer with respect to the plaintiffs' first contention is whether the trial court properly held that the defendant's assembly and installation of the walk-in cooler amounts to an "improvement to real property," thereby subjecting the plaintiffs' cause of action to the four-year period of repose. If we find that the defendant's work is the construction of an "improvement to real property," then the plaintiffs' suit, which was brought well outside the repose period, is time-barred. If, on the other hand, we find that the defendant's work did not constitute the construction of an "improvement to real property," then the repose period prescribed by Section 28-3-202 is not implicated in this case.

The subject statutory scheme does not recite a definition for the word "improvement" or the concept of an "improvement to real property."[1] The plaintiffs ask that we conclude that the walk-in cooler at issue is not an "improvement to real property" within the meaning of T.C.A. § 28-3-202 because, they contend, the cooler is only an appliance or trade fixture that is readily removable from the premises.

Our research reveals two widely-employed analytical approaches used in determining whether a particular act of construction constitutes an improvement to real property. *See* 63B Am. Jur. 2d *Products Liability* § 1631 (1997); 2 Bruner & O'Connor Construction Law § 7:174.53. One approach – the approach the plaintiffs in the instant case appear to advocate – focuses on the

[1] Several Tennessee cases and federal cases in this state have determined that construction at issue in those cases was subject to T.C.A. § 28-3-202. *See, e.g.*, ***Harper v. Holiday Inns, Inc.***, 498 F. Supp. 910 (E.D. Tenn. 1978) (holding that the plaintiffs' cause of action against the defendant for the negligent *construction of a hotel entryway* was barred by the predecessor to T.C.A. § 28-3-202); ***Agus***, 358 F.Supp. 246 (holding that the plaintiffs' cause of action against the engineer responsible for installing a *sprinkler and a smoke detector system* in an apartment building was barred by the predecessor to T.C.A. § 28-3-202); ***Harmon v. Angus R. Jessup Assocs. Inc.***, 619 S.W.2d 522 (Tenn. 1981) (holding that the plaintiffs' cause of action against the defendants involved in the design, construction, and installation of a *refrigeration system* that leaked ammonia was barred by T.C.A. § 28-3-202); ***Cornwell v. J.E. Hodge***, 1986 WL 5890 (Tenn. Ct. App. E.S., filed May 23, 1986) (holding that the plaintiffs' cause of action against the defendants for the negligent installation and inspection an *electrical wiring system* in the plaintiffs' dairy facility was barred by T.C.A. § 28-3-202).

common law fixture analysis.[2] The other approach – often called the "common sense approach" – looks to the common usage definition of the word "improvement" in defining what constitutes an "improvement to real property." Under the "common sense approach," the determination of what constitutes an improvement to real property focuses on whether the addition or betterment to the property increases the property's value, involves the expenditure of labor or money, and is designed to make the property more useful or valuable as distinguished from ordinary repairs. *See* 41 Am. Jur. 2d *Improvements* § 1 (1995).

We do not find it necessary to select one of these approaches to the exclusion of the other. One or both may be useful analytical tools in classifying the nature of work on real property depending upon the facts and the issues presented in a given case. However, since we are dealing with a statute in this case, our inquiry is guided by well-established principles of statutory interpretation:

> This Court's role in statutory interpretation is to ascertain and to effectuate the legislature's intent. Generally, legislative intent shall be derived from the plain and ordinary meaning of the statutory language when a statute's language is unambiguous. If a statute's language is expressed in a manner devoid of ambiguity, courts are not at liberty to depart from the statute's words. Accordingly, courts are restricted to the "natural and ordinary" meaning of a statute unless an ambiguity necessitates resorting elsewhere to ascertain legislative intent.

***Freeman v. Marco Transp. Co***., 27 S.W.3d 909, 911 (Tenn. 2000) (citations omitted).

In ***Watkins v. Tankersley Construction, Inc.***, No. W2004-00869-COA-R3-CV, 2005 WL 1541869 (Tenn. Ct. App. W.S., filed June 29, 2005), the plaintiffs filed suit against the defendants – a construction company and a subcontractor – for the negligent construction of their house and the negligent grading of the lot on which their house was located. ***Id.***, at *1. As in the instant case, the trial court granted the defendants summary judgment, finding that the plaintiffs' cause of action was barred by the four-year statute of repose. ***Id.*** The plaintiffs appealed the trial court's judgment as it pertained to the subcontractor, *i.e.*, the defendant responsible for performing the grading, filling, and preparation of their lot. ***Id.*** On appeal, the plaintiffs argued that the trial court erred in ruling as a matter of law that the grading work performed by the subcontractor constituted "the construction of an improvement to real property" within the meaning of T.C.A. § 28-3-202. ***Id.***, at *3. The

[2] In Tennessee, a court considers the following factors when determining whether an article is a fixture: (1) the extent that the article is annexed to the real property; (2) whether the article was intended to be permanently attached to the real property; and (3) whether the article can be removed without substantial injury to the freehold. ***In re Mayfield***, 31 B.R. 900, 903 (Bankr. E.D. Tenn. 1983); ***In re Belmont Indus.***, 1 B.R. 608, 610 (Bankr. E.D. Tenn. 1979).

plaintiffs asserted that the subcontractor's work was not "the construction of an improvement to real property" because the statute contemplated the *addition* of a structure to the property. ***Id.***, at *4. Because the subcontractor "merely push[ed] dirt around [and] remov[ed] trees," the plaintiffs argued that the subcontractor's work was not an "improvement to real property" and, therefore, was not governed by the period of repose in T.C.A. § 28-3-202. ***Id.***

The Court of Appeals affirmed the trial court's grant of summary judgment to the subcontractor, holding that the removal of trees, grading, and fill work constituted "an improvement to real property" within the meaning of T.C.A. § 28-3-202. ***Id.***, at *5. In reaching this determination, the Court cited the following definition of the term "improvement":

> A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. . . .

***Id.***, at *4 (citing ***Memphis, Light, Gas & Water Div. v. T.L. James & Co.***, 1986 WL 11588, at *3 (Tenn. Ct. App. W.S., filed October 17, 1986)) (emphasis omitted).[3] The definition provides that an "improvement" can be a "valuable addition" to property *or* an amelioration in a property's condition, an amelioration which amounts to more than a repair or replacement, which costs labor or capital, and which is meant to increase the property's value, beauty, or utility, or which is meant to adapt the property for a new purpose. ***Id.***, at *5. The court found that the subcontractor's work fell within the latter clause of the definition, stating that "it [was] undisputed that the removing of trees and the grading of the lot in question was intended to enhance the utility of the property, or to adapt it so that it would be a suitable site for the building of a house." ***Id.*** *See also* ***T.L. James & Co.***, 1986 WL 11588, at *3-4 (citing the above-quoted definition of "improvement" and holding that the defendants' digging of a "borrow pit" as part of a highway construction project was "an improvement to real property," which subjected the plaintiff's claim to the repose period found in T.C.A. § 28-3-202).

The walk-in cooler at issue falls within the first clause of the definition of "improvement" in that it constitutes a "valuable addition" to the subject property. The cooler was *added* to the property; thus, it is, by definition, an "addition" to the property. Furthermore, the cooler at issue is a structure specifically designed for cooling flowers; thus, it is "valuable" to the property, which

[3] The cited definition of "improvement" was originally taken from Black's Law Dictionary (5th ed. 1979). We note that the definition of "improvement" found in the latest version of Black's Law Dictionary is somewhat different. The most recent definition states that an "improvement" is "[a]n addition to real property, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance." Black's Law Dictionary 761 (7th ed. 1999). Under either definition, the walk-in cooler in the instant case qualifies as an "improvement" under the statute.

presently houses a floral business. In addition to meeting the requirements of the first clause of the definition of "improvement" cited in the ***Watkins*** case, we find that the cooler also fits within the second clause of the definition. The assembly and installation of the cooler was an amelioration in the property's condition. To "ameliorate" something means to "make [it] better." Black's Law Dictionary 80 (7th ed. 1999). An "amelioration" is "[t]he act of improving something; the state of being made better." ***Id.*** The walk-in cooler was added to the property to "make [the property] better" in the operation of a floral business. There is no evidence suggesting that the assembly and installation of the cooler was a "mere repair[] or replacement," or that the cooler did not "cost[] labor or capital" to construct and install. Furthermore, the cooler was clearly "intended to enhance [the property's] . . . utility," *i.e.*, usefulness, as the location of a floral business.

Considering the definition of "improvement to real property" found in ***Watkins,*** we hold that the walk-in cooler, assembled and installed by the defendant in the instant case, is an "improvement to real property" under T.C.A. § 28-3-202. Therefore, we conclude that the trial court properly held that the plaintiffs' cause of action against the defendant – a cause of action brought more than 10 years after substantial completion of the walk-in cooler – is barred by that statute's four-year period of repose.

V.

The plaintiffs also argue that the trial court erred in concluding, on the court's own motion, that their cause of action was barred by T.C.A. § 47-2-725, the four-year statute of limitations for contracts of sale. The plaintiffs assert that the court erred in relying on this statute because their cause of action sounds in negligence not in contract.

T.C.A. § 47-2-725 states, in pertinent part, that "[a]n action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued." The plaintiffs' cause of action is not "[a]n action for breach of any contract for sale." There was, of course, a contract for sale in this case. In 1994, the defendant and Mallchok, *i.e.*, the previous owner of the subject property, contracted for the sale, assembly, and installation of the walk-in cooler. The plaintiffs, however, were not parties to that contract *and* do not rely upon that contract in their allegations against the defendant. The plaintiffs' complaint is straightforward. It alleges that the defendant negligently assembled and installed the walk-in cooler by failing to use certain materials and by failing to do certain things in the assembly and installation process. The complaint does not allege, and the plaintiffs do not in any way contend, that the defendant is liable under a theory of breach of contract or warranty. We conclude that the trial court erred when it held that the four-year statute of limitations for contracts for sale barred the plaintiffs' cause of action. Because, however, we conclude that the trial court properly granted summary judgment in favor of the defendant based upon the statute of repose found at T.C.A. § 28-3-202, any error by the trial court in its interpretation and application of T.C.A. § 47-2-725 is immaterial to its grant of summary judgment to the defendant.

VI.

The judgment of the trial court is affirmed. This case is remanded to the trial court for the collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellants, Gil Cartwright and G & C Flowers, Inc.

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CHARLES D. SUSANO, JR., JUDGE